Filed 9/24/12 P. v. Ramirez CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOEL RAMIREZ, JR., Defendant and Appellant.	E053384 (Super.Ct.No. INF10001530) OPINION

APPEAL from the Superior Court of Riverside County. John G. Evans, Judge. Affirmed.

David L. Kelly, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Alana Butler and James D. Dutton, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant, Joel Ramirez, of voluntary manslaughter (Pen. Code, § 192, subd. (a)),[1] during which he used a firearm (§ 12022.5, subd. (a)). He was sentenced to prison for 21 years and appeals, claiming the trial court should have instructed the jury on self-defense and it abused its discretion in denying his post-verdict motion to disclose juror information. We reject his contentions and affirm.

FACTS

On May 19, 2006, defendant was traveling in a Dodge Ram with brothers, Noe and Sal Cruz; a Bronco driven by Emanuel Rios also contained his brother, Francisco, and Stephanie Nieto; the victim drove a white truck. An argument erupted between a group of girls, Noe, defendant, Stephanie and others, which culminated in a bottle-throwing incident, during which the back window of the victim's truck was smashed. The Ram and its occupants left the scene and the victim chased it in his white truck into an area of Indio known as the "reservation,"[2] where defendant fired 10 bullets at the victim, killing him. Details of the events leading up to the shooting and the circumstances surrounding it will be described elsewhere in this opinion.

---

[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] It was called this because all of the streets had Native American names.

1. *Instruction on Self-Defense*

Initially, the jury was instructed that if defendant killed the victim in self-defense or defense of another, he was not guilty of murder or manslaughter.[3] After this instruction was read to the jury, the prosecutor questioned when it had been decided that the self-defense instruction would be given. The prosecutor asserted that this was not "in any way" a self-defense case and the absence of a pretrial statement or testimony by the defendant that he was defending himself or someone else when he shot the victim meant that it was inappropriate. While defense counsel did not contest the prosecutor's representation that even he had not requested the instruction, he asserted that the People were required to show that the killing was not in self-defense, regardless of the absence of an assertion by defendant that he killed the victim for that reason. While the prosecutor agreed with defense counsel that he had to prove that the killing did not occur in self-defense, an instruction was required only if defendant was relying on that defense or if substantial evidence supported it, neither of which occurred in this case. Defense

---

[3] The jury was also instructed that a lesser crime to the charged murder was involuntary manslaughter. As part of that instruction, the jury was told that the People alleged that defendant committed the crime of negligently discharging a firearm in violation of section 246. At the time the charged offense was committed, section 246 punished "malicious . . . and willful . . . discharge [of] a firearm at an . . . occupied . . . vehicle." Additionally, the instruction went on to state, "Instruction 968 tells you what the People must prove in order to prove that the defendant committed the negligent discharge of a firearm." The printed Instruction 968, however, related to the crime of shooting from a motor vehicle, punishable under section 12034, subdivisions (c) & (d). The jury was instructed that to prove that defendant was guilty of shooting from a motor vehicle, the People had to prove, inter alia, that he "did not act in self-defense or in defense of someone else." Perhaps it was the existence of this instruction on shooting from a motor vehicle that motivated the trial court to include the instruction on self-defense.

counsel responded that he was not relying on self-defense as a defense, but an instruction on self-defense had been given in every murder case he tried and it was his impression that the obligation to give it was sua sponte. The prosecutor pointed out that when the trial court and counsel had discussed whether an instruction on manslaughter on the theory that defendant killed in imperfect self-defense should be given, all concluded that it was inappropriate. Additionally, the prosecutor asserted that if the court was going to allow the self-defense instruction to stand, the jury should also be instructed on, inter alia, imperfect self-defense and defendant being the initial aggressor. Later, defense counsel said he wanted to withdraw the instruction on self-defense.[4] The trial court then informed the jury that the instruction was withdrawn.

Defendant here contends that the trial court had a sua sponte duty to instruct on self-defense and its failure to do so requires reversal. We disagree.

First, defendant is precluded from complaining about the absence of this instruction, even if it was error, because it was withdrawn at his request. (See *People v. Cooper* (1991) 53 Cal.3d 771, 827; *People v. Duncan* (1991) 53 Cal.3d 995, 969.) Counsel must have acted for tactical reasons and not due to ignorance or mistake, although the tactical reason need not be expressed, but can be implied from the record. (*Duncan,* at p. 969; *People v. De Leon* (1992) 10 Cal.App.4th 815, 824.) We agree with the People that defense counsel had a tactical reason for withdrawing the instruction, i.e,

[4] Appellate counsel omits this important fact from his statement of the facts surrounding the withdrawal of the instruction by the trial court.

his defense, which was that he was not the shooter and was not even present when the victim was shot, would look ridiculous in the face of a self-defense instruction.

Additionally, we agree with the People that there was insufficient evidence to require that the instruction be given sua sponte. Defendant calls our attention to certain evidence, but it does not support this obligation. First, defendant points to a portion of the interview of Alexis, one of the four girls who were at the scene of the throwing incident. She was asked by detectives if she had told Noe or the men in the Ram that the victim was her uncle and he had a gun. She responded that she did not recall making that comment. When asked why one of her companions would tell the police that she had said that, she responded that she did not even know the victim, the implication being that she had no idea why her companion would say that. Later during the same interview, the detectives told Alexis's mother, who was present during the interview, that they were questioning Alexis because one of the other girls had said that Alexis had said certain things, and they wanted to determine if that was true. The detectives told the mother that it was important that they question Alexis about such important matters as the other girl saying that Alexis had said that the victim was her uncle and had a gun. At that point, Alexis repeated that she didn't even know the victim and she did not remember ever making the comment. Alexis' mother added that Alexis's uncle wouldn't have a gun, anyway, to which Alexis agreed. Contrary to defendant's assertion, this is not evidence establishing that the victim had a gun or that defendant had heard that the victim had a gun, requiring the giving of a self-defense instruction.

Next, defendant points to what he says is the pretrial statement and testimony of Francisco Rios, however, the citations in his opening brief are to the testimony and pretrial statements of Stephanie and have nothing to do with what defendant asserts they do. Actually, in his pretrial statement, Francisco said that he saw the victim's truck chasing the Ram. He said, "They [(presumably, both cars)] came down [the s]treet, they're going dead-end, hit the stop sign, this truck that gets that, the [Ram] would have stopped, that truck that was fishtailing, like fishtailing . . . out." Francisco was asked, "Rear-end him?" Francisco responded, "It's tailgating him. [¶] . . . [¶] So, if he would've stopped at that stop sign, they would've been hit." "[I]f [Sal] would have stopped at that stop sign th[e white] truck would've paah!" At that point, Francisco said, he and Emanuel and Stephanie jumped into the Bronco and followed the white truck and Ram into the "reservation" and by the time they got to the "reservation," the victim had been shot and all Francisco saw was the cloud of dust created by the crashing of the white truck.

Several witnesses, beside Francisco, said that the victim's white truck took off chasing the Ram, so Francisco's statement in this regard is not remarkable. However, it must be viewed in its factual context. In his pretrial statement, Francisco said that at the scene of the throwing incident, the girls were arguing with defendant or with defendant, Noe and Sal and the girls threw bottles at the Ram and defendant and Noe got out of the Ram and asked the girls, "What the fuck?" The Bronco came up to the scene and Stephanie got out of the Bronco and starting yelling at the girls about throwing bottles. Then the victim arrived at the scene in his white truck and appeared to say something

designed to get the girls to stop throwing the bottles and an argument erupted between him and the girls and someone threw a bottle at the white truck.[5] The Bronco took off and drove to an area where Francisco, Emanuel and Stephanie stopped and resumed the drinking they had previously begun there. At least 10 minutes later, Francisco saw the white truck drive by, chasing the Ram. At trial, Francisco testified that at the scene of the throwing incident, he heard girls yelling and saw the girls and the person in the white truck talking and he thought he saw the Ram in the same area. Later, he saw the white truck chasing the Ram and he, Emanuel and Stephanie got into the Bronco and followed the white truck. When they got to the "reservation" they lost sight of the Ram and the white truck. They drove into the "reservation" and on the way out, he saw a cloud of dust, which resulted from the white truck crashing.

In a pretrial statement, one of the girls told the police that at the scene of the throwing incident, someone from the Ram threw an object at the victim's white truck, shattering the back windshield, and the three occupants of the Ram, including Noe, got back in and drove off with the victim's white truck following. Another of the girls told police that at this scene, she saw the victim in his parked white truck. Another of her companions knew the victim and he called out to her. Noe and defendant got out of the Ram, which was parked there, and defendant began arguing with the victim. Defendant

---

[5] During his testimony, Francisco said that he told the police that defendant threw a bottle at the victim's white truck. He also testified that what he meant by his pretrial statement was that the girls were either arguing with each other and the victim got involved in their argument or the girls were arguing with defendant and the victim got involved in this argument.

told the victim, "Get out of the fucking car, bitch." She heard defendant say that he was "going to blast the fool." Defendant threw an object, which she believed to be a rock, at the white truck, shattering its rear windshield. Noe and defendant then got into the Ram and left, with the victim following in the white truck.

Alexis testified at trial that Noe and the person with him were upset because the girls had called him to give them a ride but the victim had arrived there first to take them. One of the girls threw a beer bottle at the Ram.

According to the evidence, no one except defendant, Noe and Sal knew what happened moments before the victim was shot inside the "reservation." According to Noe's pretrial statement, Sal drove the Ram, he sat next to Sal and defendant sat next to him, by the window. Defendant had his window down. At the scene of the throwing incident, the girls threw a bottle at the Ram. Defendant picked up a bottle and threw it at the victim's white truck and it broke the window. Sal, Noe and defendant got back into the Ram and drove off, with the victim following in the white truck "like it was gonna hit" the Ram. Noe allowed that once inside the "reservation," defendant must have fired the gun (although he refused to say that he did), because neither he nor Sal did. Noe told the police that the Ram was traveling southbound on Aztec and when they got to the intersection of Aztec and Mesquite, the victim was coming eastbound on Mesquite, and defendant began shooting at the victim.

Sal told the police that defendant was the shooter. In a pretrial statement, he said that at the scene of the throwing incident, defendant and Noe got out of the Ram while the girls were talking to the victim. Someone from the crowd threw a bottle at the Ram

and defendant and Noe got into an argument with the victim, then defendant threw a bottle at the victim's truck. Noe and defendant got back in the Ram and it took off and sped up, trying to get away from the white truck, which was following. Once in the "reservation," he lost sight of the victim's truck. The victim's truck was not behind him when he went southbound on Apache. As he approached the intersection of Apache and Mesquite, driving at a normal speed, he saw defendant, who was seated next to the passenger window, reach out the window, point a gun and fire in the direction of the white truck and the victim, as the white truck approached the intersection going eastbound on Mesquite. Sal had stopped the Ram to avoid colliding with the white truck before the shooting began. Sal turned left onto Mesquite. A drawing done by Sal suggested that the Ram had suddenly come upon the white truck, as the latter was heading towards crossing its path. A bullet hit the white truck's left tire, driver's door (going front to back) and another through the back going towards the driver's seat suggesting that the shooting continued as the white truck moved across the front of the Ram.[6] There was no evidence the victim's truck came at the Ram. Afterward, Sal asked defendant why he shot at the victim and defendant said only that he was sorry.

In his pretrial statement, defendant admitting throwing a bottle that hit the victim's truck and broke his back window, and throwing another one. He claimed he got dropped off by Noe and Sal at the house where he lived inside the "reservation," after being dropped off, he heard the gunshots and someone else had shot the victim. When asked if

[6] The diagram of the location of the bullet casings showed that all 10 were fired from the same general area.

he thought the victim's white truck was going to hit the Ram, defendant responded that the white truck chased the Ram, but he was referring to the beginning of the encounter between the two vehicles, not the end, contemporaneous with the shooting. Defendant did not testify at trial.

In light of the evidence that defendant threw the projectile at the victim's truck, smashing the window and thus endangering the victim, defendant cannot rely on the victim chasing the Ram as a basis for establishing self-defense. This is particularly true given the fact that the shooting occurred when the victim was no longer pursuing the Ram. The fear that Noe claimed he had immediately upon leaving the scene of the throwing incident, which defendant calls to our attention, is irrelevant to defendant's state of mind at the moment he fired the shots. Defendant also calls our attention to statements by Sal that he was afraid of being rammed by the victim when the victim was chasing the Ram, but he points to no evidence that that fear continued after victim stopped pursuing the Ram inside the "reservation." Moreover, as with Noe, it was Sal's fear and not defendant's. After all, Noe and Sal were unarmed that night—defendant was not.

Defendant fails to point to any substantial evidence that he was in fear for himself and or Sal and Noe at the time he killed the victim.

2. *Failure to Disclose Juror Identifying Information*

After the verdict, defendant moved for disclosure of the names and addresses of the jurors. He asserted that the jury foreperson had said that one of the other jurors, who claimed to be an expert "on the philosophy of Mexican gangs," gave a "seminar" to the jury during deliberations on the circumstances under which Hispanic gang members

testified truthfully. Defendant wanted the names and addresses of jurors so he could present declarations under penalty of perjury or testimony by them concerning possible juror misconduct. Defense counsel asserted that in his opinion, none of the jurors would be endangered by the disclosure of their names and addresses, despite the fact that two jurors had already expressed concern about possible retaliation for their verdict. Counsel asserted that if the information was disclosed, he would not reveal it to anyone without the prior express written consent of the court.

A few weeks later, defendant filed a motion for a new trial on the ground of juror misconduct, i.e., that one of the jurors claimed to have expertise as a former probation officer and gave the other jurors a "seminar" on "the code of conduct of 'Mexican gangs[.]'" In an attached declaration, defense counsel represented that the juror who had given the "seminar" told him during a phone conversation that he had given the "seminar" after the jurors had sent the trial court a note indicating that they were deadlocked. This juror asserted that he was the only juror who told the court that he had some hope that a verdict could be reached and he gave the "seminar" in an attempt to break the deadlock. The juror said he believed his "seminar" was the key to breaking the deadlock and other jurors had told him the same. The juror had come by his knowledge while a juvenile probation officer. In a declaration attached to the motion, the juror in question said, "I might be able to assist the [deadlocked] jury in reaching a verdict if I could convince them that they should take the time to 'explain' their 'reasoning' for their verdict as I had done earlier to the lone holdout juror. [¶] . . . [¶] I gave the jury two

examples of how gang[7] culture affects the answers that their members are allowed to give. For example, there is no hard and fast rule whereby gang members are always required to refuse to cooperate and to answer questions with an 'I don't know' or 'I can't remember.' Instead, gang members are allowed and sometimes even encouraged to cooperate with law enforcement and answer questions truthfully." He gave examples. He continued, "[H]ard and fast rules do not necessarily apply when it comes to gang members being allowed to answer questions truthfully. It took approximately 30 minutes for me to state my reasons for my verdict and then others 'explained' their reasons to the lone holdout juror. [¶] By about 11:00 AM the next [day], the jury reached a verdict. [¶] . . . [¶] [T]he [jury] then spoke of their own experiences living around gangs, and stated the reasons behind their decision."

During the hearing on the new trial motion, the prosecutor called the trial court's attention to the fact that the juror in question has said in his declaration that there was no hard and fast rule governing a gang member's cooperation. Additionally, he asserted, assuming that misconduct occurred, it was harmless. The trial court concluded, "[A] juror is charged with deciding in his or her own mind each witness's credibility and a juror may rely on his or her own past experiences, training and expertise to arrive at that

---

[7] In a previous declaration signed by the juror in question, but later replaced by this declaration, the juror made all his references to gangs to be references to Mexican gangs. Also, in the previous declaration, the juror had said that he gave a seminar on gang culture, but in the replacement declaration, he said merely that he stated his reasons for the verdict to the lone holdout juror and other jurors spoke of their experiences living around gangs and they explained their reasons for their verdicts. The trial court ascribed no significance to these differences.

conclusion regarding credibility, and the [c]ourt finds that the juror may also explain his or her reasoning to the other jurors, during deliberations why they believe or disbelieve someone's credibility. [¶] . . . [I]t is within everyday common knowledge that one explanation for failure or feigned failure to cooperate or to recall is fear of retribution which may come from several sources, including, gang retaliation. . . . [I]n any case, where you have this type of feigned failure to recall or the failure to cooperate, I think it's within the everyday knowledge of a jury pool that one reason for that might be fear of retribution. . . . [I]t's within the scope of the deliberation process for the jurors to discuss that. . . . [H]ere . . . there's no question that there was feigned recollection . . . . And there's no question that there was a failure to cooperate in this case.[8] [¶] . . . [¶] [The juror in question] . . . didn't violate a court order such as using a dictionary or other reference material. He did not offer expert opinion regarding any scientific evidence that was offered at the time of trial. And he did not offer any expert opinion regarding factual evidence that was provided at the time of trial. [¶] What he did was express his opinion on the credibility of one or more witnesses in this case. I don't find in this case that there is any real issue that these witnesses were not credible witnesses [in claiming they could not remember] which then allows the [c]ourt to allow into evidence their pretrial statements. So then, the issue becomes does the introduction of a gang discussion on credibility necessarily spill over to the conclusion that the defendant in this case was a

---

8 Defense counsel agreed with this. Indeed, rarely has this court seen a case, even one in which gang allegations have been made, where almost *all* the civilian witnesses claimed not to remember both what happened and what they had told the police happened soon after the crime, as occurred here.

gang member? And that's what gives the [c]ourt the most trouble. When you start talking about gangs and gang members, that is generally considered to be prejudicial. . . . [I]f you have any type of case where there are no gang allegations or gang charges, and you do have reluctant witnesses testifying, . . . it's probable that the jury, during . . . deliberations, the issue of gang involvement or gang reasons or retribution is going to come up for discussions. . . . [I]f that is the case, then in every single case where the jury talks about gangs, during their deliberations with respect to the credibility of witnesses, then every trial would involve a mistrial if that simple element came up.

Defense counsel then asserted, "[T]his compromised verdict was obtained because the one holdout juror . . . was persuaded. . . . [W]hat he or she heard after the jury came in, that they apparently didn't hear before was about the gangs. So I think it's clear that the gang discussion was prejudicial."

The trial court denied the motion for a new trial, saying, "[T]he [c]ourt cannot come to the conclusion that anything was discussed during deliberation, that the defendant himself was involved in a gang. That this was simply a discussion of the effect of gangs on witnesses not cooperating as it relates to their credibility. And based upon that, the [c]ourt finds that there was no jury misconduct . . . ."

As to the release of juror information, the trial court ruled, "[T]he [c]ourt was going to accept the declaration . . . of [the] juror . . . [in question] at face value, [and] . . . the interviewing of additional jurors was to determine whether or not it was a general discussion as opposed to a very specific discussion, and it was . . . the [c]ourt's opinion that nothing about those interviews would offer any stronger evidence than the

documentation the [c]ourt had. With respect to [defense counsel's] concern that there may have been discussions about whether or not the defendant himself was a gang member . . . was not considered by me as an issue with respect to the releasing of juror information. [¶] . . . [¶] But the difficulty . . . there is that no matter what the situation is to get to that point, you'd have to get into the thought process of the jurors, and under no circumstances are we allowed to do that. [¶] . . . [¶] . . . I thought that the declaration of [the] juror . . . [in question], with respect to the comments he made about the gang culture, was strong enough and that any additional interviewing of the other jurors would do nothing except weaken what he already stated in his declaration."

Defendant attacks the trial court's refusal to disclose juror information by asserting that what the juror in question did constituted misconduct. However, recently, in *People v. Allen and Johnson* (2011) 53 Cal.4th 60, the California Supreme Court addressed a remark a juror had made during deliberations concerning the credibility of an eyewitness, who identified one of the defendants as the shooter. (*Id.* at p. 64.) The defendants had impeached the eyewitness with his timecard, which showed that he was not at the scene of the crimes, but at work. (*Ibid.*) The eyewitness attempted to rehabilitate his credibility by explaining that he and an Hispanic coworker often clocked in for each other and that had occurred the day of the crimes. (*Ibid.*) The juror in question said that this latter testimony was a lie because he "kn[ew] Hispanics . . . [and] they never cheat on time cards," so the eyewitness must have been at work. (*Id.* at p. 66.) In concluding that the trial court had abused its discretion in dismissing this juror on the basis that he impermissibly relied on facts not in evidence, the California Supreme Court

said, "[A] distinction must be drawn between the introduction of new facts and a juror's reliance on his or her life experiences when *evaluating* evidence. [¶] . . . 'Jurors cannot be expected to shed their backgrounds and experiences at the door of the deliberation room.' [Citation.] . . . 'Jurors' views of the evidence . . . are necessarily informed by their life experiences, including their education and professional work.' . . . [¶] . . . [In *People v.*] *Steele* [(2002) 27 Cal.4th 1230], we held that the trial court did not abuse its discretion in denying the defendant's motion for a new trial based on several jurors' assertions of expertise. [Citation.] The jury in *Steele* received evidence about the defendant's military experience and training during the Vietnam War, as well as expert testimony about neurological testing performed on him. [Citation.] The defendant moved for a new trial, asserting four jurors with military experience told the other jurors it was unlikely the defendant was exposed to combat in Vietnam, and two other jurors explained, based on their experiences in the medical field, that the validity of one of the neurological tests was inadequately established. [Citation.] In rejecting the claim of misconduct, we noted, 'All the jurors, including those with relevant personal backgrounds, were entitled to consider this evidence and express opinions regarding it. "[I]t is an impossible standard to require . . . [the jury] to be a laboratory, completely sterilized and freed from any external factors." [Citation.] "It is 'virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote.'" [Citation.] A juror may not express opinions based on asserted personal expertise that is different from or contrary to the law as the trial court stated it or to the evidence, but if we allow jurors with specialized knowledge to sit on a jury, and we do, we must allow

those jurors to use their experience in *evaluating* and i*nterpreting* that evidence. Moreover, during the give and take of deliberations, it is virtually impossible to divorce completely one's background from one's *analysis* of the evidence. We cannot demand that jurors . . . never refer to their background during deliberations. . . . [Citation.] [Citation.] ([S]ee . . . *People v. Yeoman* (2003) 31 Cal.4th 93, 162 [no misconduct when jurors referenced their own experience with drugs in evaluating the defendant's drug use].) [The juror in question] plainly . . . relied on his life experience in evaluating [the eyewitness's] credibility. [¶] . . . The conflict [between the eyewitness's claim that he saw the crimes and the evidence that he was not present] went to the heart of [the eyewitness's] credibility. [The j]uror [in question]'s comments show that he did not believe [the eyewitness]'s testimony that someone punched in for him on the day of the shootings, and thus rejected his testimony. [¶] [The j]uror [in question]'s remark did not constitute misconduct. His positive opinion about the reliability of Hispanics in the workplace did not involve specialized information from an outside source. It was an application of his life experience, in the specific context of timecards and the workplace, that led him to conclude [the eyewitness] was not telling the truth about the shootings. . . . [¶] . . . [¶] It may be argued that [the j]uror [in question]'s conclusion was based upon a weak premise or rested upon an overbroad inference. Jurors, however, are the judges of credibility, and conscientious jurors may come to different conclusions. It is not the province of trial or reviewing courts to substitute their logic for that of jurors to whom credibility decisions are entrusted. . . . [¶] [The j]uror [in question]'s timecard remark did not introduce unproven facts into the case." (*Id*. at pp. 76-78, fn. omitted.)

Defendant cites no decisions holding that what occurred in this case constituted misconduct and he does not even attempt to distinguish the holding or language in *Allen and Johnson*. Having concluded that the trial court here was correct in its assessment that no misconduct had occurred, defendant could not possibly below and cannot possibly here make the requisite showing of a reasonable belief of misconduct sufficient to support the granting of his motion for disclosure of juror information. (See *People v. Jones* (1998) 17 Cal.4th 279, 317.) Moreover, defendant's current assertion that the first and second declarations the juror signed were so different in terms of his representations as to what he said to other jurors that the trial court should have disclosed the information and determined for itself precisely what he said is meritless. In the first, all his references to "gangs" were limited to "Mexican gangs." Additionally, in the second, he omitted the representation he made in the first that, "[When the foreperson and another] juror . . . joined me and . . . spoke with [defense counsel] and [the prosecutor after trial,] . . . the foreperson . . . mentioned that the jury had benefitted greatly from a seminar given by [me] who had special knowledge and expertise in Mexican gang culture." In the second, he changed the representation in the first declaration that he thought he might assist the deadlocked jury in reaching a verdict "if I shared my expertise in Mexican gang culture with them, and gave them a seminar on what I knew and what I had learned from my on[-]the[-]job training and experience" to "if I could convince them that they should take the time to 'explain' their 'reasoning' for their verdict as I had done earlier to the lone holdout juror." He changed a reference to his "expertise" in the first declaration to "experience" in the second and omitted a second reference in the first to a

"seminar." He changed, "The mutual dialogue lasted approximately 30 minutes with other jurors sharing their knowledge of gangs in their neighborhood" in the first declaration to, "It took approximately 30 minutes for me to state my reasoning for my verdict and then others 'explained' their reasoning to the lone holdout juror." He omitted from the second declaration the assertion he made in the first that the verdict was a compromise, but, defense counsel, himself, conceded this obvious point below. Finally, he added to the second declaration the representation that some of the other jurors told him that they were pleased that they continued to deliberate, presumably after initially being deadlocked, and he felt that they benefitted from his insistence that they do so and they discussed their own experiences living around gangs and stated their reasons for their decisions. We agree with the trial court that these differences were irrelevant to the issue whether this juror committed misconduct. Moreover, defendant cannot have it both ways—he cannot rely on this juror's declaration(s) to claim that misconduct occurred, then insist that this juror lacks credibility because his two declarations differ in significant respects, therefore, the identifying information of the other jurors should have been disclosed so the trial court could determine for itself which of the declarations was the accurate one. According to *Allen and Johnson*, there was no misconduct under *either* version.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

McKINSTER
J.

MILLER
J.